

required to allow those individuals an opportunity to participate in the proceedings, if they so desired.

The court agreed, and ordered service of the notice of the motion on all owners of water rights recognized under the ODD, signatories of the 1935 Agreement, owners of water rights within the Newlands Project, and other interested parties. Those persons and entities had until January 15, 2009, to respond. A review of the papers filed with the court indicate that numerous individuals and entities intend to participate in the proceedings.

### Conclusion and Implications

At this juncture in the proceedings, the court has been notified of the participation of all interested parties. The court will then enter a scheduling order, setting forth a briefing schedule on the motion to amend the ODD, which should allow all interested parties a sufficient opportunity to brief their position on the amendment of the ODD. After that point in time, and given the contentions that the amendment may have negative impacts upon existing rights, it is highly likely and evidentiary hearing will be held prior to the court ruling on the motion to amend the ODD. (J. Prunty)

## OREGON SUPREME COURT TO ADDRESS WATER USERS' PROPERTY INTEREST IN WATER RECEIVED FROM THE BUREAU OF RECLAMATION IN THE KLAMATH RIVER BASIN

*Klamath Irrigation District v. U.S.*, 345 Or. 638, 202 P.3d 159 (Or. 2009).

The Oregon Supreme Court was recently asked by the U.S. Court of Appeals for the Federal Circuit to answer three questions about Oregon law that relate to the plaintiffs' takings claims in the *Klamath Irrigation District v. U.S.* case. The certified questions predominantly concern whether under Oregon law the water users in the Klamath River Basin have a property interest, legal or equitable, in the waters received from the U.S. Bureau of Reclamation (Bureau). The Oregon Supreme Court, which has discretion to accept or deny certified questions from federal courts, accepted the three questions and thus will address the water users' interest in the federally delivered waters.

### Background—The Bureau's 2001 Termination of Water Deliveries to Irrigators

The Klamath River Basin, naturally a semi-arid region, is a place where extensive reclamation and irrigation projects have been constructed pursuant to the Reclamation Act of 1902. The Klamath Project, authorized in 1905, is managed by the Bureau to serve a number of interests, including the supply of irrigation water to agricultural interests in the Klamath River Basin. The Klamath Project provides water to about 240,000 acres of irrigable land in the basin. The plaintiffs in the *Klamath Irrigation District* case

are irrigation districts and landowners who, directly or indirectly, receive those waters. Historically, the irrigators and landowners received as much water for irrigation as they needed or simply received somewhat less during drought years. In 2001, however, the water forecasts predicted a "critically dry" year during which the inflows into Upper Klamath Lake were projected to be the smallest amounts on record.

The Endangered Species Act (ESA) requires the Bureau, like all federal agencies, to ensure that its operation of the Klamath Project is not "likely to jeopardize the continued existence of any endangered species." 16 U.S.C. § 1536(a)(2). In developing its operating plan for 2001, the Bureau performed a biological assessment and concluded its operations would likely adversely affect three endangered species: the Coho salmon, the Lost River sucker, and the Shortnose sucker. *See*, 16 U.S.C. § 1536(c)(1). In accordance with § 7 of the ESA, the Bureau requested a formal consultation with the National Marine Fisheries Service and the Fish and Wildlife Service. *See*, 16 U.S.C. § 1536(a)(2), (b). Those agencies then issued biological opinions, consistent with the Bureau's biological assessment, that recommended "reasonable and prudent alternatives" to address the threat to the three species, including reducing the amount of water

made available for irrigation. See, *Klamath Irrigation District v. U.S.*, 75 Fed. Cl. 677, 680 (2007).

Ultimately, the Bureau, in consideration of the forecasted drought conditions and its obligations under the ESA, terminated water deliveries to the irrigation districts and landowners in the Klamath River Basin in 2001. The irrigation districts and landowners protested and promptly commenced a lawsuit against the U.S., the *Klamath Irrigation District* case.

### **Litigation at the Court of Federal Claims and the Federal Circuit Court of Appeals**

On October 11, 2001, the irrigation districts and landowners filed their complaint in the U.S. Court of Federal Claims, alleging the United States, through the Bureau's actions, had unconstitutionally taken their property without just compensation and breached contracts for the delivery of water to them. Over the next six years, the Court of Federal Claims heard and decided summary judgment motions on the takings and contract claims.

The Court of Federal Claims first disposed of the taking claims when it ruled in 2005 that the irrigation districts and landowners' interests in the waters provided by the Bureau were not, as a matter of law, cognizable property interests under the Takings Clause of the Fifth Amendment. See generally, *Klamath Irrigation District v. U.S.*, 67 Fed. Cl. 504 (2005). The court held that (1) state law defines who owns interests in the waters provided by the Bureau's projects, relying on § 8 of the Reclamation Act of 1902, and (2) under a 1905 Oregon statute, the United States acquired the rights in the Klamath River Basin waters by, *inter alia*, complying with the requirements of that statute. *Id.* at 516-26. Further, the court stated in its 2005 opinion that the irrigation districts and landowners' rights in the waters are derived from the United States and thus their claims are based, if at all, in contract. *Id.* at 534-40.

The Court of Federal Claims next disposed of the irrigation districts and landowners' contract claims on summary judgment. See generally, *Klamath Irrigation District*, 75 Fed. Cl. 677. In a 2007 opinion, the court concluded that the "sovereign acts doctrine" provided a complete defense to the breach of contract claims. *Id.* at 682-85. The court held that the Bureau's termination of the water deliveries in 2001 were sovereign acts, as a result of the ESA, that prevented the Bureau from performing under the water delivery

contracts. As such, the Bureau was absolved of any breaches of contract that may have arisen from those acts.

The irrigation districts and landowners then appealed to the U.S. Court of Appeals for the Federal Circuit, seeking review of the Court of Federal Claims' summary judgment decisions on the takings and contract claims. The federal Court of Appeals has not yet rendered any decisions on the merits. The court, instead, first certified three questions about Oregon law to the Oregon Supreme Court. See, *Klamath Irrigation District v. U.S.*, 532 F.3d 1376 (Fed. Cir. 2008). The certified questions relate to the takings claims and primarily concern whether under Oregon law the irrigation districts and landowners have a property interest, legal or equitable, in the waters received from the Bureau. *Id.* at 1377-78. The questions, as drafted by the Federal Circuit, read:

- 1). Assuming that Klamath Basin water for the Klamath Reclamation Project "may be deemed to have been appropriated by the United States" pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
- 2). In light of the statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable interest in the water right acquired by the United States?
- 3). With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of the Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?

Having received a certification order with those

questions, the Oregon Supreme Court had to decide whether it would accept the questions.

### The Oregon Supreme Court Accepts the Certified Questions

The Oregon Supreme Court generally has discretion to accept or deny certified questions from federal courts. *See*, ORS 28.200; *Western Helicopters Services v. Rogerson Aircraft*, 311 Or. 361, 811 P.2d 627 (1991). In making that decision, the Oregon Supreme Court should consider whether five statutory factors are met: (1) an appropriate court, such as a federal court of appeals, certified the questions; (2) the questions presented are legal; (3) the questions present issues of Oregon law; (4) the answers to the questions could dispose of at least one claim; and (5) there is no controlling Oregon precedent.

After deciding those factors were met, including that the takings claims could be resolved by its answers, the Oregon Supreme Court decided to accept the three certified questions. *Klamath Irrigation District v. U.S.*, 345 Or. 638, 646, 202 P.3d 159 (2009). The court noted it was persuaded to take the questions, in part, because the Federal Circuit indicated it would proceed and decide the Oregon law issues if it did not. *Id.* at 649-50. The Oregon Supreme Court also raised in its 2009 opinion that it could always exercise its discretion to "decline to provide an answer to a certified question, limit [its] answer to a question, or rephrase a question." *Id.* at 650. At this time, the Oregon Supreme Court has received briefing and heard argument on the certified questions, but there has been no indication as to when a decision, if any, may be rendered.

Finally, and interestingly, the Oregon Supreme Court received the certified questions from the Federal Circuit before, and accepted the questions after, it issued *Fort Vannoy Irrigation District v. Water*

*Res. Comm'n*, 345 Or. 56, 188 P.3d 277 (2008). In that decision, the court resolved some broad questions about the ownership of water rights in irrigation districts. *Id.*; *see also* Jeffrey Hern, "Oregon Supreme Court Upholds Decision on Water Right Ownership in Favor of Irrigation Districts," 13 *West. Water L. & Pol'y Rptr.* 119 (Feb. 2009). The court in *Fort Vannoy* held that an irrigation district, as opposed to an appurtenant landowner within the district, was "the holder of a water use subject to transfer" under ORS 540.510(1) and thus had the exclusive authority to change a point of diversion associated with a water right certificate issued to the district. *Id.* With regard to the certified questions, the *Fort Vannoy* decision may be particularly important because of (1) the court's rejection of a landowner's argument that it had an ownership interest based on its beneficial use of the water provided under the water rights certificates, and (2) the court's description of the trust relationship between irrigation districts and its members, under which the latter holds equitable title. *See, id.* It is, of course, unknown what the court may draw from the *Fort Vannoy* decision.

### Conclusion and Implications

The parties to the *Klamath Irrigation District* case and others around the country eagerly await the Oregon Supreme Court's answers to the Federal Circuit's certified questions relating to the takings claims. The court's decision has the potential to influence whether irrigators and landowners throughout the country are deemed to have cognizable property interests under the Takings Clause of the Fifth Amendment in waters delivered through federal reclamation projects. It also will be extremely interesting to see how the Oregon Supreme Court relies on, if at all, its recent *Fort Vannoy* decision in answering the certified questions. (J. Hern)